INDEX

PAGE

QUESTIONS PRESENTED 1

STATUTORY PROVISIONS 2

STATEMENT OF THE FACTS 3

REASONS FOR NOT GRANTING THE WRIT 5

A. 5

B. 6

C. 7

CONCLUSION 7

TABLE OF CASES

Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) 5, 6

DeLaCruz v. People, ... Colo. ....., 492 P.2d 627 (1972) 7

Johnson v. Louisiana, ... U.S. ....., 32 L.Ed.2d 152, 92 S.Ct. 1620 (1972), 10 Cr. L. 4136 5

People v. Moreno, ... Colo. ....., 491 P.2d 575 (1971) 5, 6, 7

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955) 7

United States v. Bazinet, 462 F.2d 982, (8th Cir. 1972) 5

INDEX (Continued)

PAGE

STATUTES

Colorado Code of Criminal Procedure:
39-3-102 2

Colorado Revised Statutes, 1963:
39-2-20 2
40-3-202 (1971 Perm. Supp.) 2
40-7-54 2
40-7-57 (1967 Perm. Supp.) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-597

ROBERT E. McDANIEL,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

It is respectfully submitted that the single question presented is:

Whether, under Colorado law, a person may assault with a deadly weapon one whom he knows to be a peace officer engaged in the performance of his duties when that peace officer comes to his door to talk to him about written criminal complaints of assault that he has received from the alleged victims, with a view toward his ultimate arrest.

STATUTORY PROVISIONS

Attention is invited to the fact that the Colorado statutes applicable to this case have all been repealed.

The arrest statute, Colorado Revised Statutes, 1963, §39-2-20, has been replaced by §39-3-102, Colorado Code of Criminal Procedure, not yet published in book form, effective July 1, 1972, as follows:

> "39-3-102. *Arrest by peace officer.* (1) A peace officer may arrest a person when:
>
> (a) He has a warrant commanding that such person be arrested; or
>
> (b) Any crime has been or is being committed by such person in his presence; or
>
> (c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested. *An arrest warrant should be obtained when practicable.*" (Emphasis added)

The statute covering assault on a peace officer, Colorado Revised Statutes, 1963, §40-7-54, has, by enactment of the new Colorado Criminal Code in 1971, effective July 1, 1972, been incorporated into a first degree assault statute. Colorado Revised Statutes, 1963 (1971 Perm. Supp.), §40-3-202, in pertinent part is as follows:

> "40-3-202. Assault in the first degree. (1) A person commits the crime of assault in the first degree if:
>
> (a) • • •: or
>
> (b) • • •; or

(c) * * *; or

(d) * * *; or

(e) With intent to cause serious bodily injury upon the person of a peace officer or fireman, he threatens with a deadly weapon a peace officer or fireman engaged in the performance of his duties, and the offender knows or reasonably should know that the victim is a peace officer or fireman acting in the performance of his duties.

(2) * * * * *." (Definitions are set out in §40-3-201)

The statutory right to resist arrest, formerly contained in Colorado Revised Statutes, 1963 (1967 Perm. Supp.), §40-7-57 was repealed without replacement by enactment of the new Colorado Criminal Code in 1971, effective July 1, 1972.

STATEMENT OF THE FACTS

It is respectfully submitted that the petitioner's statement of the facts is in some respects at odds with the facts found by the Colorado Supreme Court and amply supported in the record. In other respects, his statement is simply his own conclusion, unsupported by the record.

In the second paragraph of his statement the petitioner states as a fact that he had not committed or attempted any crime prior to the police officer's coming to his door. Although this is largely irrelevant, and may be debatable, it is clearly not a categorical fact.

The third paragraph of the petitioner's statement is in some conflict with the findings of the Colorado Su-

preme Court. The facts in this respect are fairly presented in the opinion of the Colorado Supreme Court, at 449 P.2d 614:

> " . . . There is a dispute in the testimony of the officer and McDaniel as to what was said and done, but it is clear that the officer did not proceed into the house, but returned to his car to radio for more assistance (two other officers had already arrived). During this time, McDaniel went to his bedroom where he loaded and strapped to his side a .44 magnum, single-action revolver. The officer twice asked McDaniel to remove his weapon. McDaniel refused. According to defendant's testimony, he waited until the officer's hand was away from his own weapon, in order to 'get the drop on him,' then drew and cocked his weapon. Being about two feet from McDaniel, the officer grabbed the revolver just after defendant drew it. A scuffle ensued, wherein the weapon discharged three times. The officer was slightly injured, although he was not struck by a bullet. McDaniel was subsequently subdued with the help of the two other officers."

Persistently, the petitioner has sought to make it appear that Officer Turner made an unlawful entry into his home to seek him out and arrest him (Petition, pages 4, 5, 12, 13, 14, and 15), when the facts and the findings of the Colorado Supreme Court belie this claim. The events all took place at the back door of the petitioner's house.

The petitioner's statement, at page 4 of his petition, that the "law in Colorado now is that a policeman without a warrant and in the absence of exigent circumstances

can break into any man's home at any time to make an arrest . . ." is palpably a conclusion, obviously not related to the facts of this case, and, as will be shown below, patently erroneous as a proposition of law.

REASONS FOR NOT GRANTING THE WRIT

A. There is no conflict between the decision in this case and *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971), as the petitioner contends. That case does not stand for the proposition that an arrest warrant must always be used in the absence of exigent circumstances. The distinction has recently been stated in *United States v. Bazinet,* 462 F.2d 982, 987, (8th Cir. 1972):

> " . . . We do not agree that Coolidge supports this view. In Coolidge, the Supreme Court dealt with a warrantless entry into a person's dwelling place for purposes of making an arrest. A distinction has traditionally been drawn between warrantless arrests, searches, and seizures occurring within an individual's dwelling place, and those occurring in a public place . . ."

Earlier this year, at the oral argument in *Johnson v. Louisiana,* ..... U.S. ....., 32 L.Ed.2d 152, 92 S.Ct. 1620 (1972), at 10 Cr. L. 4136, Mr. Justice White, in a question, suggested that no decision of this Court held that there was a constitutional requirement for a warrant for an arrest.

The Colorado Supreme Court, in *People v. Moreno,* ..... Colo. ....., 491 P.2d 575 (1971), has indicated that, in the absence of exigent circumstances, an "officer's

entry into a private home without a valid warrant for the purpose of arresting the defendant cannot be justified." Consequently, had that factual situation been presented in this case, the Colorado Supreme Court would presumably not have been reluctant to find the arrest unlawful. As previously indicated, however, despite the petitioner's rhetoric, the facts do not show any invasion of the petitioner's home. Thus, even to raise the issue would require this Court to resolve in favor of the petitioner a question of fact that has effectively been resolved against him by the Colorado Supreme Court. On the facts found by the Colorado Supreme Court, it is hardly surprising that they found it unnecessary to discuss *Coolidge v. New Hampshire* or their own *Moreno* case, even after the petitioner emphasized *Coolidge v. New Hampshire* in his petition for rehearing.

B. The decision of the Colorado Supreme Court does not truly present a federal question. Although the Colorado Supreme Court apparently approved the procedure used by the court below in submitting to the jury the question of the lawfulness of the arrest, based on the arrest statute, it is equally apparent that the lawfulness or unlawfulness of the arrest was not essential to the court's decision. In the final analysis, the court's decision is based on the fact that the degree of force used in resisting the arrest was excessive, and that the jury was properly instructed in this respect. This is patently not a federal question. This ground alone being adequate to support the judgment, there is no occasion for review by this Court, for even if there were another federal question, as to which the Colorado Supreme Court erred, the ultimate decision would be the same on the basis of this non-federal question.

C. The questions that may be involved in this case hinge upon the facts of the case and, especially in light of the changes in the Colorado statutes, are not likely to recur. As indicated above, the pertinent Colorado arrest statute has been amended so as effectively to require a warrant "when practicable." Although it may be argued that the statutory language falls short of requiring a warrant except when there are exigent circumstances, the Colorado Supreme Court, in *People v. Moreno, supra,* and *DeLaCruz v. People,* ..... Colo. ....., 492 P.2d 627 (1972), has indicated that it will be at least as demanding as this Court with respect to warrantless arrests. It seems likely that the new statute will be strictly construed in favor of arrested persons. In any event, a decision by this Court as to the constitutionality of the old arrest statute, even if that issue were presented by the facts of this case, would be of only "isolated significance". See *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

CONCLUSION

WHEREFORE, the respondent respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

DUKE W. DUNBAR
Attorney General

JOHN P. MOORE
Deputy Attorney General

JACK E. HANTHORN
Assistant Attorney General

Attorneys for Respondent